1911

ISHAR DAS v. ASAF ALI KHAN.

CHAMIER, J.—I concur. I think that there can be no doubt that order XXI, rule 89, was intended to give persons owning or holding interests in immovable property the subject of an execution sale a last chance of saving the property. But the words "owning such property or holding an interest therein" evidently refer only to persons who own the property or hold an interest therein at the date of the application, and whether the applicant be the owner of or only the holder of an interest in the property he must show that he acquired his title before the execution sale. As I read the rule, neither the owner nor the holder of an interest who has parted with his title since the sale or who has acquired title since the sale can apply under rule 89. That was the view taken in the Oudh case cited. I agree that the appeal should be allowed.

BY THE COURT.—The appeal is allowed. The order of the court below is set aside. The sale in favour of the appellants will stand confirmed.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

1911

December, 18.

CHHITTAR KUNWAR (PLAINTIFF) *v.* GAURA KUNWAR (DEFENDANT).*

Hindu law—Hindu widow—Co-widow—Partition—Right to partition when joint enjoyment impossible.

Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property, they can by mutual agreement or otherwise separately hold the property, although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation. *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1), *Kathaperumal* v. *Venkatai* (2) and *Bhugwandeen Doobey* v. *Myna Baee* (3) referred to.

THE facts of this case were as follows :—

One Madan Mohan Lal, a Kurmi, died leaving two widows—Gaura Kuar and Chittar Kuar. The latter had a daughter by him; while the former was childless. Gaura applied to the Revenue Court for partition of her share. The plaintiff objected

* First Appeal No. 236 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Bareilly, dated the 1st of July, 1910.

(1) (1877) I. L. R., 1 Mad., 290. (2) (1880) I. L. R., 2 Mad., 194.
(3) (1867) 11 Moo. I. A., 487.

1911

CHHITTAR KUNWAR v. GAURA KUNWAR.

and was referred to the Civil Court. She accordingly brought the present suit for a declaration that according to a custom prevailing in the family, a childless widow was only entitled to maintenance and was not entitled to partition, and also that under the general law a Hindu widow cannot claim partition from her co-widow. The lower court found that the custom was not established. It held further that a co-widow was entitled to have her share partitioned without prejudice to the right of survivorship of the other widow and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, submitted that on a proper interpretation of the *wazib-ul arzes* and consideration of the evidence, the custom set up had been proved. He further submitted that one of the co-widows who were in possession of property could not apply for partition, inasmuch as the other co-widow was entitled to get her share by right of survivorship. He relied on *Kathaperumal* v. *Venkabai* (1) and *Gajapathi Nilamani* v. *Gajapathi Radhamani* (2). A co-widow cannot compel partition, but she may enjoy it under a mutual arrangement; *Bhugwandeen Doobey* v. *Myna Baee* (3), Mayne's Hindu Law, seventh edition, paragraph 554, page 752.

The Hon'ble Pandit *Sundar Lal* (with him Babu *Lalit Mohan Banerji*), for the respondent, was not called upon.

RICHARDS, C. J., and BANERJI, J.—The appellant, who is one of the two widows of one Madan Mohan Lal, brought the suit out of which this appeal has arisen against the other widow of the aforesaid deceased, for a declaration that the defendant, being childless, was only entitled to maintenance and had no right to have the zamindari villages belonging to her deceased husband, partitioned between the two widows. It appears that Madan Mohan Lal died sometime in the year 1909, leaving two widows, who are the parties to this suit. The plaintiff has a daughter, but the defendant has no issue. The names of both the widows were entered in the revenue records. The defendant applied to the Revenue Court for partition of a half share. The plaintiff objected and was referred to the Civil Court. Thereupon

(1) (1880) I. L. R., 2 Mad., 194. (2) (1877) I. L. R., 1 Mad., 290 (300).
(3) (1857) 11 Moo. I. A., 487 (575).

she instituted the present suit. She put forward her claim on two grounds; first, that under a custom prevailing among kurmis, to which caste the parties belong, a childless widow only receives maintenance and has no right to the estate of her husband; and secondly, that under the general Hindu law a widow cannot claim a partition.

The court below has dismissed the plaintiff's claim, being of opinion that the custom alleged had not been proved and that as both the widows inherited the property of their husband, they were entitled to joint enjoyment of the property and to divide it between themselves for the purpose of such enjoyment.

The plaintiff has preferred this appeal, and her first contention is that the custom alleged by her is proved. We are of opinion that this contention has no force. A number of witnesses were examined, who spoke generally as to the existence of the alleged custom, but with the exception of one witness none of the others was able to refer to any instance in which a childless widow was excluded by another having a female child. The only instance which was referred to was that of Hori; but one instance does not establish a custom. The wajib-ul-arzes of some of the villages were referred to. Some of these wajib-ul-arzes are declarations made by a single owner; and even according to these wajib-ul-arzes, it is manifest that where a widow has a male child, that male child excludes the widow and the childless widow has only a right to receive maintenance from the son. In the original wajib-ul-arzes the vernacular word used is *aulad* (issue), but judging by the context it is manifest that this word was meant to apply to male issue only.

The next contention on behalf of the appellant is that under the Hindu law a widow is not entitled to claim partition. We were referred to the following cases, namely, *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1), *Kathaperumal* v. *Venkabai* (2) and *Bhugwandeen Doobey* v. *Myna Baee* (3). In the case first mentioned, their Lordships, no doubt, observe that "widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the

(1) (1877) I. L. R., 1 Mad., 290. (2) (1880) I. L. R., 2 Mad., 194.
(3) (1867) 11 Moo. I. A., 487.

1911

CHHITTAR KUNWAR v. GAURA KUNWAR.

joint estate between them." But their Lordships further held that where the widows could not go on peaceably in the joint enjoyment of the property, they could by mutual agreement or otherwise separately hold the property, although they had no right to partition in the proper sense of the term, and that the share of one would go by right of survivorship to the other, notwithstanding the separation. In the case before us, the two widows, although entitled to enjoy the property, appear to be unable to do so peacefully unless they divide it; in fact the plaintiff in this suit has tried to exclude the defendant altogether from the whole of the property left by her husband, admitting her only to a bare right to maintenance. That being so, we are unable to hold that the defendant has no right to apply for a partition such as would enable her to enjoy her share of the property of her husband for her life. Such a partition would in no way affect the plaintiff's right of survivorship in the event of her surviving the defendant.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

1911

December, 19·

REVISIONAL CRIMINAL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

EMPEROR *v.* BALMAKUND.

Act No. II of 1899 *(Indian Stamp Act), section* 65—*Receipt—Money remitted by postal money order and receipt signed on post office form—Further receipt not exigible from payee.*

Where money is remitted by postal money order and the payee has signed the receipt in duplicate on the post office form he cannot legally be compelled to give a further receipt to the payer, and his refusal to do so will not render him liable under section 65 of the Indian Stamp Act, 1899.

THE facts of this case were as follows :—

One Gotting sent a postal money order for Rs. 34 from Mokamah to Balmakund at Allahabad, in part payment of a particular debt. Balmakund signed the usual receipts on the money order form; and the receipt intended for the remitter was sent in due course by the post office to Gotting and received by him. He thereafter demanded from Balmakund a duly stamped receipt

* Criminal Revision No. 338 of 1911 from an order of C. Rustamji, Esq., Sessions Judge of Allahabad, dated the 14th of January, 1911.